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## Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?

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# Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?

Cody Moon\*

Traditionally, constitutional courts claim that domestic commentaries and the constitutions themselves are the sole bases for the analysis and interpretation of their constitutions.<sup>1</sup> For example, a constitutional court may consider the original meaning of a constitution when adopted or it may consider the common understanding of the words as used in the present day. As this Note will demonstrate, constitutional courts are increasingly looking to other constitutional courts' holdings when interpreting their own constitutions.

Part I of this Note is a general history of constitutional courts. It includes a look at the original justification for constitutional courts and judicial review. Additionally, Part I demonstrates the rise in popularity of constitutional courts and their resultant proliferation throughout the world.

Part II discusses the constitutional courts of Canada, Australia and South Africa and analyzes the avenues those courts have taken in deciding issues under their constitutions and laws. Part II concludes by focusing on the United States Supreme Court's failure to refer to the decisions of other constitutional courts when deciding constitutional issues as well as the purported reasons behind the Court's stance.

Part III provides a comparison and analysis of the approaches to comparative constitutional analysis among the selected countries as well as their approaches to participation in the comparative constitutional dialogue.<sup>2</sup> Finally, Part IV proposes that the United

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1. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 21 (2003).

2. For a thorough and informative review of comparative constitutional analysis within

States Supreme Court adopt a modified policy of comparative constitutional analysis.

## I. HISTORY OF CONSTITUTIONAL COURTS

While the United States was the first country to practice judicial review,<sup>3</sup> it is by no means the birthplace of the concept.<sup>4</sup> This country implemented judicial review against a backdrop of centuries of European legal philosophy on the subject.<sup>5</sup> Many constitutions have drawn on this philosophical tradition by explicitly conferring the power of judicial review.<sup>6</sup> Hans Kelsen created a constitutional court for Austria's Second Republic when he drafted its 1920 Constitution.<sup>7</sup> Kelsen argued that a legal system needs a constitution to serve as the supreme law enforceable only by a "court-like" body.<sup>8</sup> He considered the constitutional court to be "a negative legislator."<sup>9</sup> Unfortunately for Kelsen, the rise of fascism ensured a short life for the Second Republic's constitutional court and others like it in Europe.<sup>10</sup> In the years following World War II, however, constitutions and constitutional courts quickly spread throughout the continent.<sup>11</sup>

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the context of capital punishment, see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999).

3. Black's Law Dictionary defines "judicial review" as "1. A court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower court's or an administrative body's factual or legal findings." BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

4. MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* 3 (1979).

5. *Id.* at 3. The origins of judicial review date back at least as far as Greco-Roman civilization. *Id.* at 5-6. The theory continued to develop during medieval times and throughout the English colonial expansion leading up to the eventual creation of the U.S. Constitution. *Id.* at 6-11.

6. GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 15 (13th ed. 1997).

7. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 34 (2000).

8. *Id.*

9. *Id.* at 35. Kelsen defines a "negative legislator" as one who cannot make law freely because the decision making is "absolutely determined by the constitution." *Id.*

10. *Id.* at 37. Other countries with short-lived interwar constitutional courts include Spain, Czechoslovakia and Germany. CAPPELLETTI & COHEN, *supra* note 4, at 13.

11. *Id.* For example, Austria reenacted its 1920 Constitution in 1945. *Id.* at 14. Italy

Unlike most constitutional courts, the United States Supreme Court is a self-created constitutional court. In other words, the United States Constitution does not explicitly give the Supreme Court the power of judicial review.<sup>12</sup> Instead, judicial review in the United States stems from the Supreme Court decision *Marbury v. Madison*,<sup>13</sup> in which Chief Justice John Marshall wrote that the Court is empowered to strike down any legislation or regulation to the extent that it conflicts with the Constitution.<sup>14</sup>

As countries around the world grow and develop, new problems arise in defining and interpreting their constitutions. With these new developments, and with new constitutional courts arriving on the

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adopted its Republican Constitution in 1948 and created its Constitutional Court in 1956. *Id.* West Germany adopted the Bonn Constitution, which created a constitutional court, in 1949. *Id.* New constitutions created constitutional courts in the Republic of Cyprus in 1960, and the Republic of Turkey in 1961. *Id.* Japan, with heavy influence from the United States, implemented a constitution allowing judicial review in 1947. *Id.* Yugoslavia became the first socialist country to begin to experiment with judicial review in 1963. *Id.*

12. Article III of the United States Constitution established the judicial branch of the United States government. U.S. CONST. art. III, § 1. Article III states that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.* The Supreme Court’s jurisdiction includes:

[A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.* at § 2, cl. 1. Moreover, the Constitution gives Congress the power to alter the appellate jurisdiction of the Supreme Court, but not its original jurisdiction. *Id.* at § 2, cl. 2. *See also* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 332-33 (1816) (holding that Congress does not have the power to modify the original jurisdiction of the Supreme Court).

13. 5 U.S. (1 Cranch) 137 (1803).

14. *Id.* at 178. Chief Justice Marshall wrote:

[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case . . . the constitution . . . must govern the case to which they both apply.

*Id.* Chief Justice Marshall further noted that “[t]he judicial power of the United States is extended to all cases arising under the constitution.” *Id.*

global scene,<sup>15</sup> the world's constitutional courts frequently engage in a global dialogue for interpretation of common themes and problems.<sup>16</sup>

## II. RECENT CONSTITUTIONAL COURT TRENDS

### *A. Australia*

Australia's Constitution is a product of the Commonwealth of Australia Constitution Act of 1900.<sup>17</sup> The Constitution created a "Federal Supreme Court" called the High Court of Australia.<sup>18</sup> Originally, the High Court did not have final authority, because its decisions were subject to review by the British Privy Council.<sup>19</sup> When Australia and the United Kingdom agreed to end this arrangement in 1986,<sup>20</sup> the High Court finally became Australia's true court of last resort in all matters.<sup>21</sup>

During the High Court's early years, the Justices relied primarily on principles applied in the courts of England.<sup>22</sup> As the High Court developed it sought independence from England, and established its own interpretations of the Australian Constitution.<sup>23</sup> The Court relied less on English jurisprudence and more on decisions of the United States Supreme Court.<sup>24</sup> Recently, the High Court has broadened its influences.

15. See, e.g., South Africa's experience discussed *infra* note 73.

16. See, e.g., *infra* Part II (discussing courts in Australia, Canada, and South Africa engaging a global dialogue in resolving constitutional issues). The idea of judicial comity is not new. In fact, the United States Supreme Court has referenced other countries' legal norms and decisions since at least the late 19th Century. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 708-11 (1893); *Hilton v. Guyot*, 159 U.S. 113, 167-81 (1895); *The Paquete Habana*, 175 U.S. 677, 687-708 (1899).

17. See Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12 (Eng.).

18. AUSTL. CONST. ch. III, § 71. The High Court of Australia was not actually established until October, 1903. Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?*, 24 MELB. U. L. REV. 1, 9 (2000).

19. Michael Kirby, *Rules of Appellate Advocacy: An Australian Perspective*, 1 J. APP. PRAC. & PROCESS 227, 228 (1999).

20. *Id.*

21. *Id.*

22. Kirby, *supra* note 18, at 9.

23. *Id.*

24. *Id.*

This trend can be seen in *Mabo v. Queensland [No.2]*,<sup>25</sup> which is considered one of the High Court's most important decisions.<sup>26</sup> In *Mabo*, the Court, by a six to one majority, rejected the doctrine of *terra nullius*.<sup>27</sup> To support its holding, the Court considered decisions from Nigeria,<sup>28</sup> Canada,<sup>29</sup> India,<sup>30</sup> New Zealand,<sup>31</sup> the United States,<sup>32</sup> and the International Court of Justice.<sup>33</sup> The Court never discussed whether the decisions of other judicial bodies should be considered. Instead, the Court's decision demonstrates that the proper way to approach the *terra nullius* issue was to assess similar cases from other countries.

In its references to other common law countries and unapologetic use of comparative constitutional analysis, *Mabo* is a typical High Court decision. In *Australia Capital Television Pty. Ltd. v. Commonwealth*,<sup>34</sup> for example, the High Court looked to decisions from Canada, the Queen's Bench in England, and the United States.<sup>35</sup> In its analysis, the Court did not question the validity of the Solicitor General's use of United States Supreme Court opinions as the sole authority supporting of the contention that political advertising by political parties and interest groups is a legitimate means of conveying relevant information to electors.<sup>36</sup> In fact, the High Court added credence to the argument by discussing cases from England, Canada, and the European Court of Human Rights.<sup>37</sup> This is

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25. (1992) 175 C.L.R. 1.

26. Gary D. Meyers & John Mugambwa, *The Mabo Decision: Australian Aboriginal Land Rights in Transition*, 23 ENVTL. L. 1203, 1204 (1993).

27. 175 C.L.R. at 15. Originally, the doctrine of *terra nullius* was applied by colonial powers to take title to newly discovered and uninhabited lands. Meyers & Mugambwa, *supra* note 26, at 1205. However, when Europeans started settling lands that were already occupied, the doctrine was expanded to cover lands inhabited by indigenous populations that were thought to be too primitive to have an organized society. *Id.*

28. 175 C.L.R. at 14, 48, 82, 85, 124-25.

29. *Id.* at 10, 13-14, 83-84, 89-90, 165-66.

30. *Id.* at 54-55, 123-24.

31. *Id.* at 64, 83, 137.

32. *Id.* at 10, 12-14, 64, 90, 135-36, 164-65.

33. *Id.* at 40.

34. (1992) 177 C.L.R. 106 (holding unconstitutional an act allowing the government to pass legislation limiting or restricting the freedom of communication and broadcasting rights).

35. *Id.* at 107.

36. *Id.*

37. *Id.* at 168-69 nn.82-85 and accompanying text.

consistent with the Court's declaration in *Cook v. Cook*<sup>38</sup> that it would continue to look to the courts of other countries for assistance and guidance.<sup>39</sup>

Like other constitutional courts, the High Court operates independently of other branches of government and other nations' judiciaries.<sup>40</sup> With its power and vast history, the High Court does not need to look to other countries for precedent, but it voluntarily does so. The High Court of Australia is truly an active participant in the comparative constitutional analysis dialogue.

### B. Canada

The Canadian Supreme Court is the product of a long internal struggle that began when England conquered Canada in 1763 and culminated in 1949, when Canada ended all appeals to the British Privy Council.<sup>41</sup> The Constitution Act of 1982 incorporated the British North American Act of 1867<sup>42</sup> and established the Charter of Rights and Freedoms,<sup>43</sup> creating a constitution with supreme authority.<sup>44</sup>

Partly as a result of its colonial past, Canada's Supreme Court has, since its inception, embraced foreign materials as authority for its own decisions.<sup>45</sup> The Canadian Supreme Court regularly incorporates the opinions of its U.S. counterpart as well as those of other

38. (1986) 162 C.L.R. 376 (defining the duty of care drivers owe to passengers who know the driver to be inexperienced and unqualified).

39. *Id.* at 390. The High Court decided this case after, but during the same year, that Australia and England formally ended the appeal to the British Privy Council from Australian courts. *See supra* notes 19-20 and accompanying text.

40. *See supra* notes 17-21 and accompanying text.

41. James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMP. L. REV. 503, 551-552 (2000). *See id.* at 545-54 for an in-depth history of the creation and development of the courts including the Supreme Court of Canada.

42. *Id.* at 553. The British North America Act of 1867 established the Dominion of Canada. *Id.* at 546. The Act incorporated Nova Scotia, New Brunswick, Quebec, and Ontario into Canada. Prince Edward Island and Newfoundland joined later. *Id.*

43. *Id.* at 553.

44. *Id.* at 553 n.423.

45. Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212-13 (1994).

countries' high courts.<sup>46</sup> British and French jurisprudence are also frequently used by Canada's Supreme Court.<sup>47</sup>

Three landmark decisions, *The Queen v. Keegstra*,<sup>48</sup> *Van der Peet v. The Queen*,<sup>49</sup> and *Lavigne v. Ontario Public Service Employees Union*,<sup>50</sup> illustrate the Canadian Supreme Court's application of foreign legal thought. The fact that different justices wrote each of these decisions for varied panels further supports the argument that comparative constitutional analysis is a norm in Canada.<sup>51</sup>

In *The Queen v. Keegstra*,<sup>52</sup> the Court considered whether the Canadian criminal code could prohibit hate speech. After examining Canadian authority, Chief Justice Dickson's opinion for the Court quickly turned to non-Canadian sources for additional assistance in interpreting the Charter of Rights and Freedoms.<sup>53</sup> The Chief Justice began his comparative constitutional analysis with an examination of United States jurisprudence and legal thought.<sup>54</sup> He defended the use of comparative constitutional analysis by noting the many similarities between the Canadian and American approaches to constitutional protection of free expression.<sup>55</sup> Not only did the Chief Justice

46. *Id.* at 212-13.

47. *Id.* at 213.

48. [1990] 3 S.C.R. 697.

49. [1996] 2 S.C.R. 507.

50. [1991] 2 S.C.R. 211.

51. The Canadian Supreme Court holds court *en banc* with a panel of nine judges. EDWARD MCWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW 34 (1986). The Canadian Supreme Court avoids sitting with an even number of justices. If one justice is unavailable, then the Court will sit with seven justices instead of eight. Mary Ann Glendon, *A Beau Mentir Qui Vient De Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569, 575 n.16 (1989).

52. [1990] 3 S.C.R. 697. Keegstra, a high school teacher, was convicted of "wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students." *Id.* at 698. On appeal, the Court of Appeal held that the criminal code violation under which Keegstra was convicted infringed on his rights under the Charter of Rights and Freedoms. *Id.* The Supreme Court overruled the Court of Appeal. *Id.*

53. *Id.* at 738.

54. *Id.*

55. *Id.* Chief Justice Dickson notes:

[T]hose who attack the constitutionality of s. 319(2) draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal, a reliance which is understandable given the prevalent opinion that the criminalization of hate propaganda violates the Bill of Rights.



consider the United States Supreme Court's opinion in *Beauharnais v. Illinois*, which upheld a criminal statute prohibiting certain types of group defamation,<sup>56</sup> he also noted lower court decisions in the United States that "distinguished and doubted" *Beauharnais*.<sup>57</sup>

After considering the American decisions, the Chief Justice acknowledged that the Canadian Supreme Court could benefit from the United States Supreme Court's 200 years of experience.<sup>58</sup> The Chief Justice noted the similarities between American and Canadian laws, but concluded that important differences exist between Canadian and American constitutional perspectives.<sup>59</sup>

Beyond comparisons with the United States, the Chief Justice considered the effect of international human rights obligations on the Court's interpretation of the Canadian Charter of Rights and Freedoms.<sup>60</sup> He also noted that the section of the Canadian criminal code in question requires particular deference because many foreign democracies have adopted similar provisions.<sup>61</sup>

*Id.* Moreover, the Chief Justice notes, "I find it helpful to summarize the American position and to determine the extent to which it should influence the s. 1 analysis in the circumstances of this appeal." *Id.*

56. *Id.* at 739 (citing *Beauharnais v. Illinois*, 343 U.S. 250 (1952)). According to the Canadian Supreme Court, the *Beauharnais* holding now only protects "offensive, public invective as long as the speaker has not knowingly lied and there exists no clear and present danger of violence or insurrection." *Id.* This statement demonstrates the Canadian Supreme Court's willingness to interpret foreign law and draw its own conclusions therefrom.

57. *Id.* at 739. Chief Justice Dickson refers to decisions from the D.C., Seventh and Eighth Circuit Courts of Appeals as well as the District Court for the Eastern District of Michigan. *Id.*

58. *Id.*

59. *Id.* at 740-43. Chief Justice Dickson notes, "Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society . . . we must not hesitate to depart from the path taken in the United States." *Id.* at 743.

60. *Id.* at 749-50. Chief Justice Dickson explains that "international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1." *Id.* at 750. He also quotes Justice La Forest:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of *Charter* guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances . . . .

*Id.* at 740 (quoting *R. v. Rahey*, [1987] 1 S.C.R. 588, 639).

61. *Id.* at 770.

*Van der Peet v. The Queen*<sup>62</sup> addressed the issue of aboriginal rights. In his opinion for the Court, Chief Justice Lamer casually justified the Court's use of United States Supreme Court jurisprudence in its interpretation and analysis of the issue.<sup>63</sup> He reasoned that the value of the United States decisions lay in "their articulation of general principles, rather than their specific legal holdings."<sup>64</sup>

In addition to United States Supreme Court jurisprudence, the *Van der Peet* Court also considered cases from the High Court of Australia.<sup>65</sup> Chief Justice Lamer acknowledged that the High Court had yet to rule on the issue before the Court, but nevertheless proceeded to adopt Australian concepts on aboriginal land title.<sup>66</sup> The Court ultimately accepted the American and Australian views in upholding the statute at issue as within the limits of the Canadian Constitution.<sup>67</sup>

In *Lavigne v. Ontario Public Service Employees Union*,<sup>68</sup> a teacher claimed that mandatory check-off clauses in his union's collective bargaining agreement violated his constitutional freedoms of association and expression.<sup>69</sup> The Canadian Supreme Court held that the agreement did not violate any rights guaranteed by the Charter of Rights and Freedoms.<sup>70</sup> *Lavigne* is unique due to the structure of the Court's opinion. The Court heard the case as a panel

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62. [1996] 2 S.C.R. 507.

63. *Id.* at 541. Chief Justice Lamer transitions to United States jurisprudence without a specific heading in the opinion. Instead, he simply states, "[t]he view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J." *Id.* at 540.

64. *Id.* at 541. Chief Justice Lamer wrote "I agree with Professor Slattery both when he describes the Marshall decisions as providing 'structure and coherence to an untidy and diffuse body of customary law based on official practice' and when he asserts that these decisions are 'as relevant to Canada as they are to the United States.'" *Id.* That the Chief Justice can make such a claim unaccompanied by citations to Canadian judicial precedent for incorporating foreign jurisprudence illustrates both how commonly the Canadian Supreme Court looks to international sources and how accepted the practice is among the Canadian public.

65. *Id.* at 544.

66. *Id.* This is comparative constitutional analysis at its boldest. The Court happily adopts a foreign court's analysis of an issue that the foreign court has failed to resolve.

67. *Id.* at 547, 571-72.

68. [1991] 2 S.C.R. 211.

69. *Id.* at 211.

70. *Id.* at 212.

of seven justices and produced neither a majority nor a dissenting opinion. Of the four separate opinions, three expressly incorporated United States Supreme Court jurisprudence.<sup>71</sup> Although the seven Justices did not fully agree on the issue before the court, all acknowledged the relevance of United States Supreme Court pronouncements on the issue.<sup>72</sup>

### C. South Africa

The South African Constitutional Court is one of the world's youngest constitutional courts.<sup>73</sup> However, it has already demonstrated its capacity to tackle major issues that have come before every established constitutional court.<sup>74</sup> In its consideration of important constitutional issues, the Constitutional Court does not hesitate to look to other constitutional courts for guidance and comparison.<sup>75</sup>

In *State v. Makwanyane*, the Constitutional Court used its power of judicial review<sup>76</sup> to hold the death penalty unconstitutional as cruel

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71. *Id.* at 218-20. None of the Justices took issue with the reliance on United States Supreme Court jurisprudence. Justice Cory, the only Justice not to mention a United States Supreme Court case in his opinion, indicated his agreement with Justice Wilson, whose opinion incorporates United States Supreme Court jurisprudence. *Id.* at 230-31, 274-77.

72. *See supra* note 71.

73. The current system in South Africa is the result of a very unusual series of events. On September 6, 1996, the "Constitutional Court of South Africa . . . declared the constitution of South Africa to be unconstitutional." Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL. 695, 695 (1996). Justice Sachs, of the South African Constitutional Court, explained in his presentation that South Africa created an "Interim Constitution" to serve as law until a new constitution could be drafted. *Id.* at 696. The Interim Constitution contained thirty-four broad principles with which the new constitution would have to comply. *Id.* at 696-97. The Constitutional Court had the job of ensuring the new constitution's compliance with the Interim Constitution. *Id.* at 697. This enabled the Constitutional Court to declare the new constitution unconstitutional. *Id.*

74. *See The State v. Makwanyane* 1995 (3) SALR 391 (CC) (holding the death penalty unconstitutional); *Nat'l Coalition for Gay and Lesbian Equal. v. Minister of Home Affairs*, 2000 (2) SALR 1 (CC) (ruling discrimination based on sexual orientation and marital status unconstitutional).

75. *See, e.g.,* Sachs, *supra* note 73, at 700 (stating that South Africa's Constitutional Court "found the decision of the German Constitutional Court . . . particularly instructive" in interpreting the South African Constitution).

76. *See S. AFR. CONST.* ch. 8, § 167(5) (enabling the Constitutional Court to strike down legislation as unconstitutional).

and inhumane.<sup>77</sup> The Court began its analysis with a thorough discussion of United States Supreme Court death penalty rulings.<sup>78</sup> The Court then turned to high court decisions from nearly a dozen countries, including Canada,<sup>79</sup> Hungary,<sup>80</sup> and India.<sup>81</sup> The Court also considered decisions by the European Court of Human Rights<sup>82</sup> and the United Nations Committee on Human Rights.<sup>83</sup> The Court seemed to assume that its expansive comparative constitutional analysis was essential to determining the death penalty's constitutionality.

These decisions appear to illustrate that such comparative constitutional analysis is common in the Constitutional Court's jurisprudence. Moreover, the Court does not limit the scope of its comparative analysis to just the most familiar, established courts. References to the constitutional law of countries like Hungary,<sup>84</sup> Trinidad and Tobago,<sup>85</sup> and Namibia<sup>86</sup> are also common.

#### *D. Comparative Constitutional Analysis and the U.S. Supreme Court*

Though it has been reluctant to fully embrace it, the use of comparative constitutional analysis is not a new issue to the United States Supreme Court. As early as 1893, the Justices debated the issue,<sup>87</sup> at which point it was the dissenters who decried the practice of looking beyond our borders for judicial guidance and assistance.<sup>88</sup> In 1894, in a case dealing with comity between nations in a conflict of laws situation, the Court debated the enforceability of foreign

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77. (3) SALR at 413.

78. *Id.* at 415-17, 418, 420, 421-23.

79. *Id.* at 423-24.

80. *Id.* at 429-30.

81. *Id.* at 426-29.

82. *Id.* at 426.

83. *Id.* at 425-26.

84. *See, e.g., id.* at 436-38.

85. *See, e.g., Fose v. Minister of Safety and Security*, 1997 (3) SALR 786, 810 (CC).

86. *See, e.g., State v. Williams*, 1995 (3) SALR 632, 642-43 (CC).

87. *See Fong Yue Ting v. United States*, 149 U.S. 698, 737, 757 (1893) (Brewer & Field, J.J., dissenting) (rejecting the application of foreign doctrine of inherent sovereignty and noting the irrelevance of foreign practices to United States constitutional law).

88. *Id.*

judgments in U.S. courts.<sup>89</sup> In 1900, the Court held that courts in this country are obligated to give effect to certain international laws.<sup>90</sup> Traditionally, however, the United States Supreme Court has been reluctant to apply comparative constitutional analysis when interpreting the United States Constitution.<sup>91</sup>

Currently, the Supreme Court's most vocal opponent of comparative constitutional analysis is Justice Antonin Scalia.<sup>92</sup> Among legal scholars siding with Justice Scalia on this issue, one of the more prominent is Bruce Ackerman. Professor Ackerman argues that the "spirit of the American Constitution requires limiting the scope of inquiry to American sources."<sup>93</sup>

The Court's leading advocate of incorporating ideas from other constitutional courts is Justice Stephen Breyer,<sup>94</sup> whose views on the subject are generally shared by Justices John Paul Stevens,<sup>95</sup> David H. Souter,<sup>96</sup> and Ruth Bader Ginsburg.<sup>97</sup> Justice Sandra Day

89. *Hilton v. Guyot*, 159 U.S. 113 (1894).

90. *See, e.g., The Paquete Habana*, 175 U.S. 677, 708 (1900). This decision has never been overturned by legislation or by subsequent Supreme Court decision.

91. Aharon Barak, *The Supreme Court, 2001 Term-Forward, A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002) (stating that the United States Supreme Court makes little use of comparative law).

92. In 1997, Justice Scalia wrote, "comparative analysis [is] inappropriate to the task of interpreting a constitution." *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

93. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3 (1991). Ackerman writes:

To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern . . . . As we lose sight of these ideals, the organizing patterns of our political life unravel.

*Id.* at 3-4, 6.

94. In his dissenting opinion in *Printz*, Justice Breyer argues for the use of comparative constitutional analysis. 521 U.S. at 976-77. Justice Breyer refers to the Federalist Papers in arguing for comparative analysis. *Id.* at 977. He states, "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." *Id.*

95. *See Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (noting the relevance of international views on the death penalty).

96. *See Washington v. Glucksberg*, 521 U.S. 702, 785-86 (1997) (discussing the approach taken to assisted suicide in the Netherlands).

97. *See Ruth Bader Ginsburg & Deborah Hones Merritt, Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV.

O'Connor has also signaled her willingness to consider, and possibly incorporate, foreign jurisprudence under appropriate circumstances.<sup>98</sup> Even Chief Justice William Rehnquist, one of the current Court's more conservative justices, acknowledges that the Court will probably look to foreign sources more in the future.<sup>99</sup> Notwithstanding the apparent receptiveness of a majority of today's Court, and despite the efforts of past Justices such as William

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253, 282 (1999) (calling comparative analysis "emphatically . . . relevant to the task of interpreting constitutions and enforcing human rights").

98. Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 711 (1998). "Following a daylong exchange of views with ECJ [European Court of Justice] members and the opportunity to attend a hearing, both Justice O'Connor and Justice Breyer noted their willingness to consult ECJ decisions 'and perhaps use them and cite them in future decisions.'" *Id.* See also Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up Conversation on Proportionality*, 1 U. PA. J. CONST. L. 583, 638-39 (1999). Jackson quotes Justice O'Connor:

I think that I, and the other Justices of the U.S. Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. Some, like the German and Italian courts, have been working since the last world war. They have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies. Others, like the South African court, are relative newcomers on the scene but have already entrenched themselves as guarantors of civil rights. All these courts have something to teach us about the civilizing functions of constitutional law.

*Id.* (quoting Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 1997 Spring meeting, American College of Trial Lawyers, reprinted in 4 INT'L JUDICIAL OBSERVER, June 1997 at 2).

99. In 1989, Chief Justice Rehnquist gave a speech at a symposium in connection with the 40th anniversary of the German Basic Law. In his speech, Chief Justice Rehnquist stated:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly ground in so many countries, it is time that the United States courts begin looking to the decision of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the future.

William Rehnquist, *Constitutional Courts: Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE, A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

Brennen, Jr.,<sup>100</sup> the United States Supreme Court has yet to join the global dialogue on comparative constitutional analysis.<sup>101</sup>

### III. COMPARISON AND ANALYSIS OF RECENT TRENDS

Justice Claire L'Heureux-Dube of the Canadian Supreme Court is an active contributor to the comparative constitutional analysis dialogue. Yet, Justice L'Heureux-Dube warns that courts adopting foreign reasoning as their own must take care to avoid the "Pitfalls of Globalization"<sup>102</sup> arguing that courts should carefully consider the context underlying a foreign court's treatment of a particular issue.<sup>103</sup>

The constitutional courts of Australia, Canada, and South Africa also actively participate in the global dialogue on comparative constitutional analysis. All three of these courts use United States Supreme Court jurisprudence as a primary guide when interpreting their own constitutions and laws.<sup>104</sup> This is not surprising considering the widespread use of the U.S. Constitution as a Model for other nations' constitutions and judicial systems.<sup>105</sup>

An analysis of Canada's Supreme Court gives valuable insight into the global dialogue.<sup>106</sup> Canada and the United States have similar

100. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Brennan wrote, in dissent, that "contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis." *Id.* at 389. Justice Brennan argued that since other countries have outlawed capital punishment altogether or reserve it for "exceptional crimes," the United States should not allow persons under the age of 18 to be sentenced to death. *Id.*

The idea that the United States Supreme Court should employ foreign sources in its analysis has also found favor among many legal scholars. Professor Mark Tushnet notes "I have developed the view that the Constitution licenses comparative analysis with respect to both federalism and separation of powers. In its narrow version, the argument is that the Constitution might sometimes license comparative inquiry when other sources of constitutional interpretation run out." Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1235 (1999).

101. See Barak, *supra* note 91, at 214.

102. Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of Rehnquist Court*, 34 TULSA L.J. 15, 26-27 (1998).

103. L'Heureux-Dube notes, "Political and social realities, values and traditions differ across borders, regions and levels of development. In particular, pressing human rights issues often differ significantly from developed to developing countries, and different solutions in different places are unquestionably necessary." *Id.*

104. See generally Part II of this Note, *supra*.

105. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 403, 1116 (2000).

106. I have chosen to focus on Canada first because its Supreme Court is more established than either Australia's or South Africa's. In addition, Canada is very open about considering the

legal systems and social norms.<sup>107</sup> Thus, the idea of the Canadian Supreme Court's referral to decisions from the United States Supreme Court is understandable.

In *Queen v. Keegstra*<sup>108</sup> the Supreme Court of Canada undertook a thorough analysis of U.S. jurisprudence in considering the constitutionality of a Canadian criminal statute. Ultimately, the Court found the United States Constitution irrelevant.<sup>109</sup> However, the fact that the Court discussed U.S. jurisprudence extensively in a case where the outcome did not depend on it illustrates how regularly the Court utilizes U.S. and other constitutional court jurisprudence when interpreting Canada's constitution. In fact, none of the Justices took issue with the Court's use of comparative constitutional analysis. A dissenting opinion referenced U.S. and other international decisions and statutes as extensively as the majority did.<sup>110</sup>

As an example of the Supreme Court of Canada's routine participation in the comparative constitutional analysis dialogue, *Keegstra* illustrates a pattern. Even in cases where the Court decides not to follow other constitutional courts, examples from such courts which appear relevant to the Court's analysis is open to considering. Moreover, the Court's use of comparative constitutional analysis is rarely the basis of a dissenting opinion.

As the youngest court considered in this Note,<sup>111</sup> the South African Constitutional Court is unique in the wide range of sources it considers in its constitutional analyses. The Court looks, whenever necessary, to find authority that will help it interpret South Africa's laws and constitution. However, the Court regards foreign decisions as merely sources of ideas.<sup>112</sup> This is in marked contrast to the Supreme Court of Canada's repeated focus on, and remarkable

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jurisprudence of the United States Supreme Court when interpreting the Canadian Constitution. La Forest, *supra* note 45, at 213.

107. *Id.* at 212-13.

108. [1990] 3 S.C.R. 697.

109. *Id.* at 740-41.

110. For U.S. jurisprudence, see *id.* at 812-20. For other international decisions and statutes, including the European Commission on Human Rights and U.N. Human Rights Committee, see *id.* at 820-26.

111. See *supra* note 73.

112. See, e.g., *State v. Makwanyane*, 1995 (3) SALR 391 (CC) (holding the death penalty unconstitutional despite consulting United States Supreme Court decisions to the contrary).



deference to, the pronouncements of a select few outside jurisdictions.

The High Court of Australia's approach falls somewhere between Canada's and South Africa's. Like the Supreme Court of Canada, the High Court accords great weight to certain foreign authorities.<sup>113</sup> But like South Africa's Constitutional Court, the High Court consults a fairly broad range of foreign sources.<sup>114</sup> The different approaches taken by Canada, Australia, and South Africa illustrate the array of choices available should the United States Supreme Court choose to enter the global dialogue on comparative constitutional analysis.

As Justice L'Heureux-Dube has recognized,<sup>115</sup> comparative constitutional analysis continues to proliferate, with countries as diverse as Namibia and England increasingly participating in the international dialogue.<sup>116</sup> Nevertheless, obstacles remain. As a court of last resort, the constitutional court of any given country needs to maintain uniformity. If a constitutional court considers foreign opinions when it decides a case, attorneys in subsequent cases need to be able to rely on the continued application of the same rules. But

113. See *supra* notes 34-37 and accompanying text.

114. See, e.g., *Polyukhovich v. The Commonwealth*, (1991) 172 C.L.R. 501 (discussing decisions from Germany, Israel, New Zealand, and the International Court of Justice).

115. *Id.* at 21. Justice L'Heureux-Dube states,

[I]t was appropriate, until recently, to speak of the interaction among judges in different places as a process where some courts impacted others. Colonies, countries with less developed jurisprudence in areas like human rights, and smaller or developing countries all received, through various processes, the jurisprudence and approaches of others.

Current trends . . . show how dramatically this picture is changing. Rather than a one-way transmission, the development of human rights jurisprudence, in particular, is increasingly becoming a dialogue. Judges look to a *broad* spectrum of sources in the law of human rights when deciding how to interpret their constitutions and deal with new problems. To a greater and greater extent, they are *mutually* reading and discussing each others' jurisprudence.

*Id.*

116. L'Heureux-Dube, *supra* note 102, at 21. In the recent Namibian case of *Mwellie v. Ministry of Works*, [1995] 4 L.R.C. 184, the Constitutional Court considered decisions from India, United States, Canada, England, Malaysia and South Africa as well as the European Court of Human Rights. *Id.* In England, a recent decision concerning the Constitution of Antigua and Barbuda considered jurisprudence from Canada, the United States, India, South Africa, and Zimbabwe as well as the European Court of Human Rights and the European Commission on Human Rights. *Id.* at 22.

when one constitutional court decides an issue one way and another reaches a different conclusion, who determines which court is correct? When courts in the United States disagree, the United States Supreme Court can decide the issue.<sup>117</sup> Once fully immersed in the dialogue for comparative constitutional analysis, however, it is no longer possible to have a court of last resort because no country wants to subordinate its constitutional court to that of some other country. Yet, the problem of a split among the constitutional courts still exists, and there is no uniform rule to follow.

#### IV. PROPOSAL

For any country, the danger of full immersion into the global dialogue of comparative constitutional analysis is that judicial comity may one day require the country's highest court to reach a decision that is not in the country's best interests. Accordingly, the United States Supreme Court must be certain of a few things before considering or applying a decision from a foreign court. First, the basis and reasoning of the foreign decision must be considered in the context of the originating country. Additionally, the Court must maintain predictability. Any uncertainties introduced by comparative constitutional analysis will lead to an increase in the number of cases in our already over-burdened legal system.

Looking beyond the possible "Pitfalls of Globalization",<sup>118</sup> comparative constitutional analysis offers unique opportunities to learn about new methods of analysis and new approaches to issues that domestic courts have yet to address. As the world continues to modernize, its constitutional courts will increasingly face common issues. For example, the internet affects people all over the world. Each country must determine for itself the acceptable uses of this technology.

Constitutional courts must determine the appropriate course for their respective countries, and how they will interpret their constitutions to account for factors that may not have been considered when their constitutions were written. These courts must also weigh

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117. U.S. CONST. art. III, § 1; U.S. CONST. art. VI.

118. L'Heureux-Dube, *supra* note 102, at 26-27.

the impact of their decisions on the rest of the world as well as how decisions from other constitutional courts will affect them.

The internet's growth has positive aspects as well. Worldwide internet access to electronic databases makes foreign decisions available to any constitutional court that is interested.<sup>119</sup> With easy access to foreign decisions, the odds are in favor of increased dialogue in comparative constitutional analysis.

The United States Supreme Court is currently not an active participant in the comparative constitutional analysis dialogue.<sup>120</sup> In order to preserve the nation's identity and uniqueness, the Court should refrain from fully entering the dialogue. Instead, the Court should find a balance between adopting a general theory of comparative constitutional analysis and avoiding the "Pitfalls of Globalization."<sup>121</sup> The best way to achieve this result is to categorize a specific issue when the Court first considers it. The Court must decide whether a particular issue is something that has a unique impact on the United States and its citizens and culture. If the answer to this question is yes, then under no circumstances should the Court engage in comparative constitutional analysis. However, if the issue before the Court is a general issue or one that affects the world as a whole, then the Court should proceed with caution.

## V. CONCLUSION

The United States is a world leader with one of the oldest constitutional courts. Its position in the world legal community requires the United States Supreme Court to engage in the comparative constitutional dialogue. As a leader, the Supreme Court can show other constitutional courts that it is within acceptable limits to consider the opinions of other courts. In doing so, the Supreme Court is in a position to warn other constitutional courts of the dangers of overreliance on comparative constitutional analysis. The

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119. See, e.g., South Africa Constitutional Court decisions, at <http://www.concourt.gov.za/> (last visited Mar. 23, 2003); High Court of Australia decisions, at [http://www.austlii.edu.au/au/cases/cth/high\\_ct](http://www.austlii.edu.au/au/cases/cth/high_ct); (last visited Mar. 23, 2003); The Constitutional Court of Azerbaijan Republic decisions, at <http://www.constitutional-court-az.org/decisions.htm> (last visited Mar. 23, 2003).

120. Barak, *supra* note 91, at 114.

121. See *supra* note 102 and accompanying text.

Supreme Court should lead by example and show the world's constitutional courts where that line needs to be drawn.